

**STATE'S NOTICE OF INTENT TO USE DEFENDANT'S OTHER ACTS AND/OR CRIMES
PURSUANT TO ARIZONA RULES OF EVIDENCE 404(b) AND 404(c)**

The defendant's other acts are similar in time and nature to the charged offenses; therefore, no expert testimony is needed to establish emotional propensity.

The State of Arizona hereby gives notice to the defendant that the State intends to elicit testimony concerning the defendant's other crimes, wrongs or acts. This testimony will be used pursuant to Rule 404(c), Ariz. R. Evid., to prove the defendant's emotional propensity to commit sexually aberrant acts. Specifically, a State's witness, A., will testify that the defendant molested her when he started touching her breast and crotch when the defendant thought she was sleeping. The following Memorandum of Points and Authorities supports this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND:

The defendant is charged with the serious crimes of one count of public sexual indecency, a Class 5 felony; one count of public sexual indecency, a Class 1 misdemeanor; and one count of molestation of a child, a Class 2 felony and dangerous crime against children in the first degree. The defendant exposed himself to victims D. and J., and he molested victim S.

Witness A was babysitting for S. and her brother when the defendant and J. returned home. Because of the late hour, A. stayed at the apartment, sleeping on the living room couch. J. slept with the children in the only bedroom, and the defendant slept on the living room floor. After a while, the defendant got on the couch with A. and started touching her breast and crotch. A. says she believes the defendant thought she was asleep. A. then moved onto the floor and the defendant left her alone. In addition, A. says there were other times when the defendant tried to touch her and she told him to leave her alone. A. did not

come to the apartment again unless the defendant was gone or someone else was there with the defendant.

II. EVIDENCE OF THE DEFENDANT'S SEXUAL CONDUCT WITH "A" IS ADMISSIBLE TO SHOW THE DEFENDANT'S EMOTIONAL PROPENSITY TO COMMIT SEXUALLY ABERRANT ACTS.

Rule 404(c) of the Arizona Rules of Evidence allows evidence of aberrant sexual propensity of the defendant to be admitted into evidence if the evidence is relevant. It provides as follows:

(c) Character evidence in sexual misconduct cases:

In a criminal case in which a defendant is charged with having committed a sexual offense, . . . , evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening events;

(vii) other similarities or differences;

(viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 401(c)(1).

A. The defendant's sexual conduct with A. is not remote to the defendant's current sexual conduct.

The defendant molested A. by touching her breast and crotch during the recent past few years when A. was babysitting S. and her brother.

B. The defendant's sexual conduct with A. is similar to the defendant's current sexual conduct.

The similarities in this case: the familial relationship, the living arrangement, the same type of conduct, and the pattern of victim selection, all show that the defendant has a continuing emotional propensity to molest young girls. *Cf. State v. Crane*, 166 Ariz. 3, 799 P.2d 1380 (App. 1990) [court found acts of vaginal intercourse with a 15-year-old and acts of manual masturbatory contact between the penis of an adult and the private parts of a 7-year-old female were similar for purposes of emotional propensity so that no medical testimony was required]; *State v. Weatherbee*, 158 Ariz. 303, 762 P.2d 590 (App. 1988) [court allowed three of defendant's daughters from a prior marriage to testify about sexual abuse inflicted upon them by the defendant in a trial in which the defendant was charged

with sexually abusing two of his daughters from the current marriage]; *State v. Cousin*, 136 Ariz. 83, 664 P.2d 233 (App. 1983) [court found that fondling the vagina of a 9-year-old child, fellatio, vagina fondling, and digital penetration of another child who is eight or nine years old, and vagina fondling, digital penetration, and oral sex on a third child who is between the ages of ten and twelve, are all similar acts for purposes of emotional propensity]; *State v. Superior Court*, 129 Ariz. 360, 631 P.2d 142 (App.1981) [court found acts of sexual intercourse or attempted sexual intercourse with two sisters approximately 8 years of age, sexual intercourse or attempted sexual intercourse with the defendant's 7-year-old sister, attempted sexual intercourse with a 4-year-old female, and the kidnap and sexual assault and child molestation of an 11-year-old boy to be similar enough such that no medical testimony was needed].

C. All of the charged offenses are sexually aberrant acts.

An aberration has been defined as a deviation from the proper, normal, or typical course. *State v. Beck*, 151 Ariz. 130, 134, 726 P.2d 227, 231 (App.1986). Specific acts defined by courts as sexually aberrant include sodomy, child molestation, and lewd and lascivious conduct. *State v. McFarlin*, 110 Ariz. 225, 228, 417 P.2d 87, 90 (1973).

In fact, repeated acts of “French-kissing” young girls by a 54-year-old man have been found to be aberrant. See *State v. Bailey*, 125 Ariz. 263, 609 P.2d 78 (App.1980). In *Bailey*, the defendant was charged with contributing to the delinquency of a minor for French-kissing a 10-year-old girl. A.R.S. 13-3612(1) defined delinquency as “any act which tends to debase or injure the morals, health or welfare of a child.” The prior acts admitted included kissing other young girls on the lips and French-kissing a fifth grader within a few weeks of the charged offense. In determining that the offense charged “involved an

unnatural sexual act or a sexual aberration,” the *Bailey* court stated:

While a kiss may be an acceptable manner of expressing affection and not constitute a “sex act,” the situation here was different. The manner of kissing and the numerous times the appellant kissed the young girls here illustrate an abnormal motive and propensity for sexual aberration. “French-kissing” and repeated kissing of little girls on the lips by a 54-year-old man is unnatural, and makes the offense charged one involving sexual aberration.

125 Ariz. at 266, 609 P.2d at 81.

In this case, the defendant's molestation of A. is a deviation from the proper, normal, or typical course.

D. Expert testimony is not necessary to show that the defendant has a continuing emotional propensity to commit sexually aberrant acts.

The trial court can admit evidence of other acts if it finds that “there is a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.” Rule 404(c)(1)(B), Ariz. R. Evid.¹

In this case, expert testimony² is not necessary. The defendant's sexual conduct with A. is similar to what he did with B., J. and S. These acts occurred within a short, continuous period of time. Additionally, the acts are sexually aberrant acts. Thus, no expert

¹ The Comment to Rule 404(c) specifically states:

Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a “reasonable” basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

² A person need not have a medical degree to qualify an expert in the area of emotional propensity. In *State v. Lopez*, 170 Ariz. 112, 822 P.2d 465 (App. 1991), the court held that a psychologist who had a Ph.D. degree could testify regarding the general

testimony is necessary under Rule 404(c).

However, the State will be ready to present expert witness testimony through a Doctor G. to show that the defendant does possess an emotional propensity to commit sexually aberrant acts if the trial court feels that a propensity hearing is necessary.

III. EVIDENCE OF THE OTHER ACT IS RELEVANT AND IS NOT UNFAIRLY PREJUDICIAL.

Evidence of the defendant's sexual conduct with A. is relevant because it tends to support the credibility of the current victims' charges. See *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983); *State v. Mosely*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978).

As a noted legal scholar on evidence has pointedly stated:

It is inherently improbable that a person whose prior acts show that he is in fact a rapist . . . would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims (footnote omitted). As we shall see, the Justice Department is undeniably right on several scores: evidence of an accused's uncharged sexual misconduct is probative of that improbability, and that improbability is relevant in a sex offense prosecution.

Imwinkelried, Edward J., "A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions," 44 *Syracuse L. Rev.* 1125 (1994).

The basis for this use of prior sexual misconduct is not an attempt to comment on a defendant's character, but rather is a logical inference about the objective improbability of a large number of similar, false accusations against a defendant. Such use of prior act testimony does not invite the jury to speculate about the character of the defendant. Rather it asks the jury to evaluate prior act testimony exactly in the manner that the jury

characteristics of sex offenders and victims.

instructions direct them to:

You must decide the believability of witnesses. In doing so, take into account such things as their ability and opportunity to observe, their memory and manner while testifying, any motive or prejudice they might have, and any inconsistent statements. Consider each witness' testimony in light of all of the other evidence in the case.

R.A.J.I. Criminal Standard Instruction No. 18.

IV. CONCLUSION

Because the charged acts are similar acts, occurring within a short, continuous period of time, and are sexually aberrant acts, the defendant possesses an emotional propensity to commit sexually aberrant acts against D., J., S., and A. This evidence is relevant and the probative value is not substantially outweighed by any unfair prejudicial effect. Accordingly, the evidence of the defendant's sexual acts against A. is admissible under Rule 404(c).

Additionally, if the court decides that expert testimony is needed on the emotional propensity issue, the State is willing to present testimony from Dr. G. to establish the defendant's emotional propensity to commit sexually aberrant acts. In the event that this expert testimony is needed, the State requests a short continuance to present that testimony.